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As Liquidating Agent For Western Corporate Federal Credit Union

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NATIONAL CREDIT UNION
ADMINISTRATION BOARD AS
LIQUIDATING AGENT FOR
WESTERN CORPORATE FEDERAL
CREDIT UNION,

Plaintiff,

v.

ROBERT A. SIRAVO, TODD M. LANE,
ROBERT J. BURRELL, THOMAS E.
SWEDBERG, TIMOTHY T. SIDLEY,
ROBERT H. HARVEY, JR., WILLIAM
CHENEY, GORDON DAMES, JAMES
P. JORDAN, TIMOTHY KRAMER,
ROBIN J. LENTZ, JOHN M. MERLO,
WARREN NAKAMURA, BRIAN
OSBERG, DAVID RHAMY and
SHARON UPDIKE,

Defendants.

Case No.: CV10-01597 GW (MANx)

**RESPONSE OF PLAINTIFF
NATIONAL CREDIT UNION
ADMINISTRATION BOARD AS
LIQUIDATING AGENT FOR
WESTERN CORPORATE
FEDERAL CREDIT UNION TO
SUPPLEMENTAL REQUEST FOR
JUDICIAL NOTICE OF
DIRECTOR DEFENDANTS AND
JOINDER BY OTHER
DEFENDANTS [DOCKETS 140,
142, 143, AND 145]**

Date: July 7, 2011
Time: 8:30 a.m.
Courtroom: 10

1 On June 20, 2011, the National Credit Union Administration filed a complaint
2 against J.P. Morgan Securities LLC and other defendants (the "JP Morgan
3 Complaint") seeking recovery for misrepresentations and omissions in connection
4 with the sale of specific private label MBS to various corporate credit unions
5 including the Western Corporate Federal Credit Union ("WesCorp"). It issued a
6 press release about the lawsuit on the same day. The defendants in this action have
7 requested that the Court take judicial notice of the JP Morgan Complaint and the
8 press release, arguing that those documents "render implausible the NCUA's
9 allegations here that the Director Defendants acted so unreasonably as to take them
10 outside the Business Judgment Rule and that the officer defendants acted
11 negligently under the circumstances then known." Docket 140 at 3:11:14.

12 Plaintiff National Credit Union Administration Board as Liquidating Agent
13 for WesCorp (the "NCUA") does not object to the Court taking judicial notice of the
14 filing of the JP Morgan Complaint or the issuance of the press release. However,
15 the inferences the defendants seek to draw from these documents in support of their
16 motions to dismiss are not justified by the documents and are not proper. The
17 allegations of the JP Morgan Complaint cannot insulate the defendants from liability
18 in this action for WesCorp's unbridled purchases and toxic concentration of highly
19 risky Option ARM MBS and the other actions and omissions alleged in the Second
20 Amended Complaint that caused WesCorp's failure.

21 Notwithstanding the arguments of the defendants, the JP Morgan Complaint
22 has little bearing on the allegations in the Second Amended Complaint in this case.
23 It seeks recovery for misrepresentations and omissions related to 29 specific private
24 label MBS. It alleges, *inter alia*, that the offering documents for those securities
25 violated Sections 11 and 12(a)(2) of the Securities Act of 1933 and other securities
26 laws of California, Illinois, Kansas and Texas. Of these 29 securities, only three
27 were purchased by WesCorp.
28

1 The three securities were sold based on two sets of offering documents. As to
2 those offering documents, the JP Morgan Complaint alleges in its charging
3 allegations that: “[a]t the time WesCorp purchased the Certificates it did not know
4 of the untrue statements and omissions contained in the registration statement,” JP
5 Morgan Complaint, ¶¶ 338, 378, 423, and that “[a]t the time it purchased the
6 Certificates it did not know of these untruths or omissions,” *id.*, ¶ 458.

7 None of the three securities WesCorp purchased were Option ARM MBS.
8 The losses on the three securities comprised less than \$50 million of the \$6.8 billion
9 in losses that caused WesCorp to fail. The purchases of the securities alleged in the
10 JP Morgan Complaint were not a material cause of WesCorp’s failure.

11 In their requests for judicial notice, the defendants obscure the fact that the
12 securities at issue in the two complaints are different.¹ They argue that the NCUA’s
13 allegations in this case are rendered implausible “[b]ecause the NCUA now charges
14 others with misstating or omitting the risks associated with RMBS and admits that
15 investors could obtain ‘limited or no access to information concerning the actual
16 quality of loans underlying the RMBS.’” Docket 140 at 3:7-14. However, the acts
17 and omissions alleged in the two complaints are causally independent, and
18 defendants never explain what they believe the link to be.

19 The fact that two sets of offering documents at issue in the *JP Morgan* case
20 contained misstatements unknown to WesCorp does not render any less
21 unreasonable the failure of the Director Defendants to control the concentration of
22 WesCorp’s Option ARM MBS or to set meaningful concentration limits for its
23 private label MBS in general. It does not render the actions and omissions of the
24

25 ¹ Sometimes the defendants’ obfuscation is misleading. They suggest that the
26 failure to treat Option ARM MBS as a new type of security is “undermined”
27 because “the NCUA admits that the history of RMBS stretches back to the 1970’s.”
28 Docket 140 at 3:21-25. However, the allegation the defendants cite, paragraph 30,
refers to MBS based on conforming loans and issued by government agencies –
securities that bear little resemblance to Option ARM MBS and that were treated by
WesCorp as a different security type from private label MBS at issue in this case.

1 officer defendants alleged in the Second Amended Complaint any less a breach of
2 their respective duties of care. Similarly, the fact that in general investors had
3 limited access to information concerning the quality of the loans underlying private
4 label MBS requires investors who are in fiduciary positions such as the defendants
5 to exercise greater caution in purchasing such securities, not less caution.

6 Similarly, nothing in the NCUA press release contradicts the allegations of
7 the Second Amended Complaint or “shows that the Director Defendants and Burrell
8 made investment decisions that seemed prudent, based on the information known at
9 the time.” Docket 140 at 5:28-6:1. The press release describes the JP Morgan
10 Complaint. The portions cited by the defendants refer to investments in the
11 securities at issue in the JP Morgan Complaint, not to investments in private label
12 MBS generally and not to investments in Option ARM MBS specifically.²

13 The allegations of the JP Morgan Complaint are not a shield protecting the
14 defendants from further scrutiny of their own culpability for the failure of WesCorp.
15 If the factual allegations of the Second Amended Complaint are proven, the liability
16 of the defendants for breach of fiduciary duty is plausible, and the motions to
17 dismiss the Second Amended Complaint must be denied.

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19 DATED: June 28, 2011

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23 By: /s/ Michael H. Bierman
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Administration Board As Liquidating Agent
For Western Corporate Federal Union
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27 ² To the extent there is any ambiguity as to what the press release is referring to,
28 its contents are not admissions that can be accorded judicial notice because they are
subject to reasonable dispute.